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(5) **Supreme Court of the United States**

No. 874.

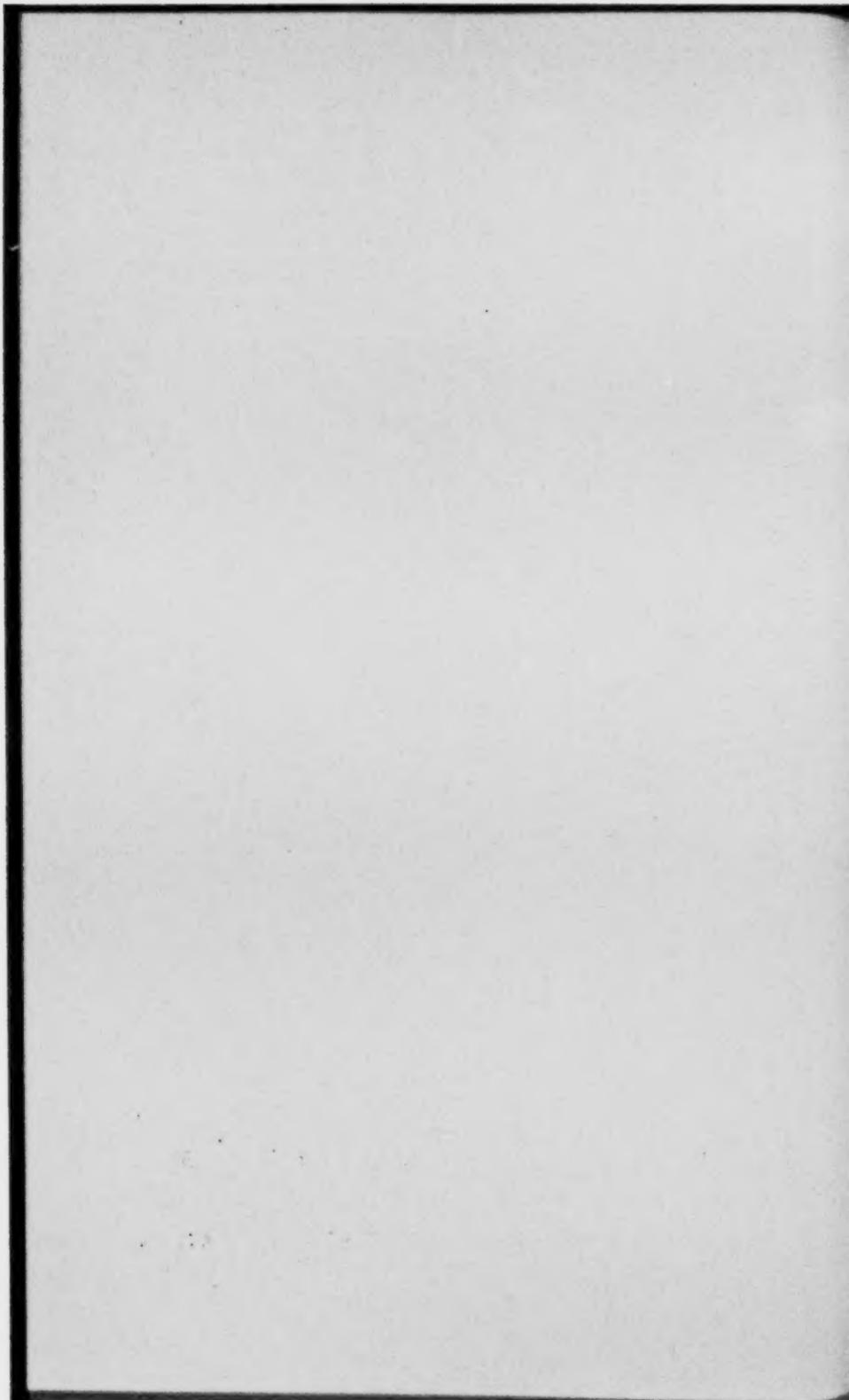
THOMAS H. SWOPE AND VIRGINIA McALPINE,
PETITIONERS AND APPELLANTS BELOW,
VS.

KANSAS CITY, KANSAS, A MUNICIPAL CORPORATION; ROY WHEAT, FRANK BROWN AND FRANK H. HOLCOMB, COUNTY COMMISSIONERS OF WYANDOTTE COUNTY, KANSAS; UNION PACIFIC RAILROAD COMPANY, A CORPORATION; AND THE MINNESOTA AVENUE, INC., A CORPORATION, RESPONDENTS AND APPELLEES BELOW.

BRIEF OF RESPONDENTS AND APPELLEES BELOW,
Kansas City, Kansas, a Municipal Corporation; Roy Wheat, Frank Brown and Frank H. Holcomb, County Commissioners of Wyandotte County, Kansas, and The Minnesota Avenue, Inc., a Corporation, in Opposition to Petition for Writ of Certiorari.

ALTON H. SKINNER,
City Attorney,
JOSEPH A. LYNCH,
Deputy City Attorney,
Both of Kansas City, Kansas,

*Counsel for Respondents and Appellees
Below, Kansas City, Kansas, a Municipal Corporation, Roy Wheat, Frank Brown and Frank H. Holcomb, County Commissioners of Wyandotte County, Kansas, and The Minnesota Avenue, Inc., a Corporation.*



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sioners of Wyandotte County, Kansas, and The Minnesota
Avenue, Inc., a Corporation, in Opposition to Petition for
Writ of Certiorari.

This proceeding was originally filed in the United States District Court for the District of Kansas, First Division, by petitioners, and was brought to recover property dedicated as a public levee. Petitioners claimed to be heirs of some of the dedicators. Petitioners claimed that title reverted to them because of abandonment and misuse of the property.

After hearing the evidence, the trial court made findings of fact and conclusions of law, and entered judgment in favor of Respondents and against Petitioners (R. 20-26).

In the petition for writ of certiorari, petitioners set forth the following specifications of error intended to be urged (page 13):

"(1) The Circuit Court of Appeals erred in ruling that the opening of the greater part of the dedicated land, under statutory authority, to private uses, unlimited in character, did not, as to such part of the land, constitute a lawful abandonment of the dedication use and purpose.

(2) The Circuit Court of Appeals erred in ruling that the above private uses are promotive of and consistent with the purpose of the dedication.

(3) The Court of Appeals erred in ruling that in devoting the levee tract to such private uses the respondent City acted within its discretionary powers as trustee of the levee property.

(4) The opinion of the Circuit Court of Appeals is in direct conflict with *Juneau Ferry Co. v. Morgan*, 236 Fed. 204 (9th Circuit).

(5) The Court erred in relying upon the case of *Kansas City v. Woods*, 117 Kan. 141, 230 Pac. 79, as *stare decisis*, although these petitioners were not parties to that litigation."

In their appeal to the Circuit Court of Appeals, Petitioners took exception to only some portions of certain of the findings of fact (R. 1, 2). For the convenience of the court we here set out in full the findings of fact, and italicize the portions excepted to by Petitioners (R. 20-26):

Findings of Fact.

1. In the year 1859 the dedicators of Wyandotte City, Kansas (now Kansas City, Kansas), being seven in

number, each owning a one-seventh interest in the town property, filed the Plat of said Wyandotte City, Kansas (now Kansas City, Kansas); that upon said Plat appeared, as a part of the ground dedicated to "Public Grounds," a plot of ground designated upon the said plat as "The Levee" and described in said plat as "extending from the northern boundary of the Ferry Tract to the northern boundary of the town, and from the front lots to the rivers"; that said plat was so filed, and is now, in Plat Book number 1, page 3, in the office of the Register of Deeds, Wyandotte County, Kansas, in Kansas City, Kansas; that through the filing of said Plat the said "Levee" property became and was dedicated to the public. That the said dedication was accepted by Wyandotte City and by Wyandotte County, Kansas, and defendant City, later, *built adequate and permanent dikes along the river fronts of said "Levee Tract."* That by such dedication and acceptance, and under the express provisions of Sec. 12406, G. S. Kan., 1935, which was in force at the time that said plat was filed the fee title to said Public Levee became vested in the County of Wyandotte, in the State of Kansas, but the dominion of said "Levee," and the control of the use of the said "Levee" became vested in said Wyandotte City, Kansas, now the City of Kansas City, Kansas.

2. That ~~Thompson~~^{Thomas} H. Swope, plaintiff herein, is a residuary devisee of Thomas ~~S.~~ Swope, one of the seven dedicators of the Levee in question, and said plaintiff has always been a citizen and resident of the state of Missouri. That Virginia McAlpine, plaintiff herein, is the widow of Robert McAlpine, who died in 1932, intestate and without issue, and who with his brother, still living, John McAlpine, were the sole heirs of Joel Walker, another of

the seven dedicators; that said Robert McAlpine and John McAlpine were also the heirs of one-half of the estate of another of the seven dedicators, to-wit: John McAlpine, who died intestate in or about the year 1872; that Virginia McAlpine is a citizen and resident of the state of Illinois, and has been such for many years.

3. That the matter in controversy or dispute, in this cause, exceeds the sum of \$3,000, exclusive of interest and costs.

4. The platted limits of the Public Levee have grown by accretion to several times their original proportions, the area included in the Levee being now at least 105 acres.

5. Within a few years after the original dedication of the Levee, river transportation at Kansas City, Kansas, ceased entirely, and was not resumed until within the past ten years. During that period the Levee property, which is located close to the main business district of the City, was permitted to grow up in weeds and remained largely unused, although portions of it were, from time to time, used for railroad rights of way and for industrial purposes by lessees of the City.

6. Section 1, of chapter 43, enacted by the Legislature of the State of Kansas at its special session in 1933, authorized Kansas City, Kansas, to issue its revenue bonds to pay the cost of improving, constructing, reconstructing or repairing public levees, docks, wharves, river terminals, grain elevator terminal docks, and such storage, railroad and all other facilities which will make the publicly owned levee of such city convenient and accessible for use in connection with water transportation. Section 6 of that statute authorized the governing body of the city

to erect and construct on the Public Levee improvements and facilities authorized and mentioned in the Act, and to lease the same for a term not exceeding 99 years at such rental and upon such conditions as in the judgment of said governing body would be in the best interest of the city.

7. In 1937, the Kansas Legislature amended Section 1 of this statute by enactment of Chapter 135, which enlarged the provisions relative to the class of improvements that might be constructed upon the Public Levee and financed by the issue of revenue bonds, and provided that all such structures should be of such a character as in the judgment of the governing body of the City would be necessary and convenient for the accommodation of shipping by highway, pipe line, rail and water in connection with commerce or water transportation on navigable rivers adjoining the public levee.

8. Following the enactment of these statutes the defendant herein, Kansas City, Kansas, through issuing its own revenue bonds and with Federal Aid Funds, has spent sums in excess of five million dollars in improving the Public Levee by the erection of the following structures:

(a) A wharf or loading and unloading dock for boats, which is, so far as the evidence discloses, adequate for the present needs of river transportation.

(b) A large river-rail *grain elevator* terminal building owned by the defendant City, but leased to a corporation which handles the actual operation. This grain elevator is connected with the wharf by overhead grain carriers so that grain may be transferred to and from

boats on the river. It is also connected with the wharf or dock by railroad tracks and paved roadways.

(c) A cold storage and ice manufacturing plant, which is connected with the wharf, or dock, by railroad tracks and paved roadways.

(d) A food terminal or *wholesale market* for the handling of agricultural products, which is *connected with the wharf or dock by railroad tracks and paved roadways*.

(9) Defendant, *Union Pacific Railroad Company*, has leased from the City certain railroad tracks constructed by the City, and has constructed, itself, certain tracks and a switch yard upon the Levee property, being all under leases from and authority of defendant, *Kansas City, Kansas*, which *railroad tracks and switch yard constitute a connection between rail, river and highway traffic*. The trackage on the Public Levee, whether owned or operated by railroads, constitute facilities in interstate commerce *directly connected with and available for use in connection with water transportation on the navigable rivers adjoining said Public Levee*.

10. Various of the structures above described which have been erected by the defendant City *on the Levee* tract have been leased by the City to the defendant, *Minnesota Avenue, Inc.* The buildings constructed on the Public Levee, owned and operated by the City and *The Minnesota Avenue, Inc.*, a managing agent for the City, in themselves *constitute facilities designed for and capable of being used as warehouses, and receiving depots in connection with water transportation on the navigable rivers adjoining said Public Levee*.

11. All of the structures erected upon said Public Levee, including the *railroad tracks and buildings men-*

tioned above, have been erected and leased for the purposes authorized by the Kansas statutes mentioned in Findings Nos. 6 and 7, constitute *individually, and as a whole, facilities for use in interstate commerce by highway, rail and water transportation.*

12. This Court takes judicial notice of the decisions of the Supreme Court of Kansas in the following cases where the Kansas Supreme Court considered the rights of the City in connection with the use of the Public Levee:

McAlpine v. Railway Co., 68 Kan. 207, 75 Pac. 73.

Kansas City v. Wyandotte County, 117 Kan. 141, 230 Pac. 79.

State ex rel. v. Kansas City, 140 Kan. 471, 37 Pac. 2d 18.

Robertson v. Kansas City, 143 Kan. 726, 56 Pac. 2d 1032.

State ex rel. v. Kansas City, 149 Kan. 252, 86 Pac. 2d 476.

State ex rel. v. Kansas City, 151 Kan. 2, 98 Pac. 2d 101.

By these decisions of the Supreme Court of Kansas, the law of Kansas has been established upon the following points in relation to the Levee property:

I. That the nature of the use permitted under the dedication of this land as a "levee" is not restricted within the narrow bounds contended for by the plaintiffs; that much broader uses are authorized than as a mere place for loading and unloading river traffic—that the dedication was for other purposes as well (68 Kan. 212-217).

II. That misuse or non-use of the property for river transportation is not sufficient to justify reverter, unless its use for the dedicated purposes has become impossible, or so highly improbable as to become practically impossible (68 Kan. 208).

III. That it was not beyond the discretionary power of the city government to lease the levee property and grant a license for its use to a private corporation for a term of years for a money consideration (117 Kan. 141).

IV. That the erection of such structures on the public levee and the leasing of the same by the city constitute a valid exercise of the administrative discretion vested in the governing body of the city (117 Kan. 147).

V. That the only proper plaintiff in an action for injunctive relief against abuse of power by municipal officers is the State, or one of its officers charged with the responsibility of scrutinizing the acts of public officers or boards (143 Kan. 726).

13. The *evidence does not establish* that there has been *non-user or mis-user of the levee property*.

14. The complaint filed, and the evidence introduced, show that the legal title to the Public Levee of Kansas City, Kansas, was vested in Wyandotte County on the date the plat was filed, and that the dominion and control over said Public Levee is vested in the City of Kansas City, Kansas; that said Public Levee is *being used for the purposes named, expressed and intended in the dedication*, and that plaintiffs have no right, title or interest in said Public Levee.

Conclusions of Law.

1. The acts of the City in constructing improvements upon the levee and in leasing the same have constituted a lawful exercise of its powers by the governing body of the City.

2. Upon the facts and the law the plaintiffs have shown no right to relief.

3. Judgment should be entered for the defendants and disposing of the action with prejudice, at plaintiffs' costs.

4. The foregoing Findings of Fact and Conclusions of Law having disposed of the case on the merits, it is unnecessary to determine the procedural question of the sufficiency of parties plaintiff under Rule 19A.

RICHARD J. HOPKINS,
Judge.

We call the court's attention to the fact that petitioners in their appeal to the Circuit Court of Appeals, did not challenge, object or except to, findings of fact made by the trial court, numbered 6 and 7, by which findings the court found that the improvements made by the City of Kansas City, Kansas, on the Public Levee, were constructed and leased under the provisions of Chapter 43, Laws of Kansas, special session, 1933, and Chapter 135, Laws of Kansas, 1937, which amended Section 1 of Chapter 43, Laws of 1933, special session.

It is clear from such findings that the improvements were constructed under the laws above set out and not under the provisions of chapter 125, Laws of 1929, as petitioners now contend in their brief for writ of certiorari filed in this court.

We also call the court's attention to the fact that petitioners did not challenge, object or except to finding of fact No. 12, made by the trial court. By so failing to challenge, object or except to findings numbered 6, 7 and 12, petitioners cannot now be heard to complain of such findings.

In paragraph 12 of the findings of fact and conclusions of law made by the trial court, the trial court sets

forth a number of decisions made by the Supreme Court of Kansas, of which the trial court took judicial notice. The Public Levee of Kansas City, Kansas, was dedicated as such in 1857. We understand this transcript of record filed in the United States Circuit Court of Appeals is on file in the Supreme Court. Exhibit 1, at page 54 of the record, is a copy of the dedicatory clause and map of the Public Levee at the time of its dedication.

This action involves the title to real estate locally situated. In the case of *Swift v. Tyson*, 16 Pet. 1, 41 U. S. 1, 10 L. Ed. 871, decided in 1842, it was held that the 34th section of the Judiciary Act of 1789 reading as follows, to wit:

"That the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise recognize or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

is limited in its application to state laws strictly local; that is, to the positive statutes of the state, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate.

In *Swift v. Tyson*, on page 18 of the original publication, the United States Supreme Court used this language:

"The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construc-

tion thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."

The later case of *Erie v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, did not change the rule above quoted in the case of *Swift v. Tyson*, nor overrule the same. The rule in *Erie v. Tompkins* may be stated as follows:

A federal court will follow the statutes and decisions of the highest court of the state in which it sits, and will administer the same justice which the state court would administer between the same parties.

Other cases to the same effect are:

J. Bacon & Sons v. James W. Martin, 305 U. S. 380;

Alton Railroad Company v. Illinois Commerce Commission, 305 U. S. 548;

Texarkana v. Arkansas Louisiana Gas Co., 306 U. S. 188;

Six Companies of California v. Joint Highway District, 85 L. Ed. (Advance Sheet) 159;

West v. American Teleph. & Teleg. Co., 85 L. Ed. (Advance Sheet) 146; and

Fidelity Union Trust Co. v. Ethel Field, 85 L. Ed. (Advance Sheet) 176.

There is no difference of opinion between the Federal Courts upon the question involved in this case. This action relates to the title to property that is fixed and immovable, which has been improved under the authority of state laws. Every step of said improvement, and every law involved, has been passed upon by the Supreme Court of Kansas, and the action of the City in making the

improvements has been found to be a valid exercise of administrative power.

McAlpine v. Railway Co., 68 Kan. 207, 75 Pac. 73.
Kansas City v. Wyandotte County, 117 Kan. 41, 230 Pac. 79.

State ex rel. v. Kansas City, 140 Kan. 471, 37 Pac. 2d 18.

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State ex rel. v. Kansas City, 149 Kan. 252, 86 Pac. 2d 476.

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State ex rel. McDowell v. McCombs, 156 Kan. (Advance Sheet) 391.

United States v. U. P. R. R. & Kansas City, 32 Fed. Supp. 917, 313 U. S. 450, 85 L. Ed. 1453.

Swope et al. v. Kansas City, Kansas, et al., 32 Fed. Supp. 917, 132 F. 2d 788.

In *Union Pacific R. R. v. U. S.*, 313 U. S. 450, 85 L. Ed. 1453 (l. c. U. S. 467, L. Ed. 1467), the Supreme Court of the United States said:

"The judgment of the Supreme Court of Kansas in *State ex rel. Parker v. Kansas City* (151 Kan. 2, 98 Pac. 101) that the City, in its proprietary capacity, under Kansas law has 'authority * * * to carry out * * * such policies and transactions as may be to the best interests of said city * * *' is not reviewable here."

Petitioners on page 23 of their brief state:

"The opinion of the Circuit Court of Appeals conflicts with the opinion of *Juneau Ferry Co. v. Morgan*, 236 Fed. 204 (9th Cir.), where the court said: * * *"

and the petitioners quote only a portion of a paragraph taken from the opinion of the court.

We set out in full the paragraph from which petitioners quote only a portion (l. c. 206):

"The rule is that the power to lease corporate property held by a municipality for public use cannot ordinarily be wholly or partly diverted to a possession or use exclusively private *without specific legislative authority*, and that a town cannot lease a part of a public dock to a private concern, nor can a city which has condemned private property for use as a wharf lease it unconditionally for a term of years to be used in the prosecution of private business and for private gain."

It is to be noted that the court said that *without specific legislative authority* a town could not lease a part of a public dock.

In the instant case, Kansas City, Kansas, had *specific legislative authority* to construct the improvements on the Public Levee and *to lease the same* under the provisions of chapter 43, Laws of Kansas, 1933, Special Session, and Chapter 135, Laws of Kansas, 1937. The opinion in the Circuit Court of Appeals in our opinion does not conflict with *Juneau Ferry Co. v. Morgan*.

On page 24 of their brief, petitioners state that the opinion of the Circuit Court of Appeals recites that the Levee tract has grown by accretion to several times its original size, and there is not a trace of evidence in the record to sustain this assertion.

On page 13 of their brief filed in the Circuit Court of Appeals, petitioners make the following statement:

"It is true that accretions have added to the original subject of this dedication."

An examination of plaintiff's Exhibit 1 (page 54 of the record), which shows the Public Levee as originally

platted, and an examination of Exhibit 4 (page 77 of the record), shows the size of the Levee at the time the improvements were constructed by the City of Kansas City, Kansas, thereon. Both of these Exhibits are drawn on practically the same scale. It is clear, from an examination of each of them, that the Public Levee has grown to several times its original size.

In the case of *Kansas City v. Wyandotte County*, 117 Kan. 141, 230 Pac. 79, this same tract of land was before the Supreme Court, in which case the Kansas Supreme Court held the Levee tract had grown in acreage to many times its original extent.

On pages 24 and 25 of their brief, petitioners state:

"The opinion below states that petitioners claim to be seized of such reversionary title. The petitioners never made any claim other than that they ought in equity and good conscience to be paid the ground value of the land diverted."

In their complaint, petitioners allege:

"4. That these plaintiffs are seized of such reversionary title in said 'Levee' as was held by some of the said dedicators, from whom such title passed to these plaintiffs through immediate or mesne testamentary devisees, or by the Kansas laws of descent and distribution and dower" (R. 9).

In their prayer, petitioners prayed the court to enter an order to determine whether or not plaintiffs are entitled to assert a reverter to parts of the Levee (R. 12).

Respondents assert that the Circuit Court of Appeals has not decided an important question of local law in a way probably in conflict with applicable local decisions, nor did the Circuit Court of Appeals render a decision in

conflict with the decision of another Circuit Court of Appeals on the same matter, nor did the Circuit Court of Appeals decide a federal question in a way probably in conflict with an applicable decision of this court. Respondents submit that the application for a writ of certiorari should be denied.

Respectfully submitted,

ALTON H. SKINNER,

City Attorney,

JOSEPH A. LYNCH,

Deputy City Attorney,

Both of Kansas City, Kansas,

Counsel for Respondents and Appellees

Below, Kansas City, Kansas, a Municipal Corporation, Roy Wheat, Frank Brown and Frank H. Holcomb, County Commissioners of Wyandotte County, Kansas, and The Minnesota Avenue, Inc., a Corporation.